

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No. 1325 of 2022

IN THE MATTER OF:

Mr. Kuldeep

...Appellants

Versus

Future Netwings Solutions Pvt. Ltd.

...Respondent

Present:

For Appellant: Advocate Prerak Khurana, Advocate Vaibhav Gaggar, Advocate Mrityunjay Mahendra, Advocate Monica Lakhnupal, Advocate Shivani Sethi, Advocate Dev Karn, Advocates

For Respondent:

ORDER

10.11.2022: Heard Learned Counsel for the Appellant.

2. This Appeal has been filed against the Order dated 13th July, 2022 passed by the Adjudicating Authority (National Company Law Tribunal, Kolkata Bench, Kolkata). By which Order, the Application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (IBC) by the Appellant has been dismissed.

3. The Appellant's claim was based on an Agreement with the Corporate Debtor to receive ten percent (10%) of the commission of sale of goods to M/s. Shapoorji Pallonji & Co. Ltd. Appellant's case is that payments which were due under the commission, ten percent was not paid hence notice under Section 8 was issued demanding the amount on 07.09.2019. Thereafter, Reply was also received on 25.09.2019. Another Demand Notice has been issued on 12.10.2020 under Section 8 of the Code claiming amount of Rs. 1,26,50,000/- as debt due. The Corporate Debtor issued a notice of dispute

dated 04.11.2020 denying the claim and it was submitted in the Reply Notice that Appellant is not entitled for any payment since the project was never awarded by M/s. Shapoorji and Pallonji & Co. Ltd.. The Adjudicating Authority issued notice and after hearing the parties, has dismissed the Section 9 Application.

4. Learned Counsel for the Appellant challenging the Order contends that Appellant was entitled to receive ten percent commission by virtue of contract between the parties and further there was acknowledgement issued on 20th February, 2019 by email where five percent of the commission was offered to be paid. Learned Counsel for the Appellant submits that contract which was awarded by the new Company M/s. Niveshan, New Delhi was a related company and hence Appellant was entitled for ten percent commission.

5. We have considered the submissions of Learned Counsel for the Appellant and have perused the record.

6. The Demand Notice dated 12.10.2020 which was issued under Section 8 of the Code claiming amount of 1,26,50,000/- was based on the Memorandum of Understanding dated 1st June, 2018 entitling the Appellant to claim commission of ten percent on sale of goods to the end client M/s. Shapoorji and Pallonji & Co. Ltd.. The notice given under Section 8 captures the agreement and all the contents thereof. The notice was replied by the Corporate Debtor giving a notice of dispute on 04.11.2020. In the Reply Notice, which is a notice of dispute, following has been categorically stated:

“At the very outset, we would like to inform you that your Demand Notice is completely misconceived,

vague, baseless, bad in law, devoid of any merit and frivolous and we deny and dispute your claim in totality. We do hereby place on record that you are no way entitled to receive any amount from our company and you are not a creditor of us in any manner. You are not an operational creditor and there is no operational debt and you have not provided any service to us.

You have claimed an alleged amount of Rs. 1,45,21,506.85 on the ostensible reason, that you were responsible to ensure sole of both passive items like cables and active items like switches, routers etc. to Shapporji Pallonji & Co. Ltd., New Delhi for use at an upcoming project at Pragati Maidan, New Delhi for an integrated Exhibition cum Convention Centre on Design Engineering procurement and construction basis.

As per Clause 1 of Memorandum of Understanding (MOU) dated 1st June, 2018, wherein it was stated that the goods and services of our company are to be sold to M/s Shapporji Pallonji & Co. Ltd., New Delhi or their related companies. We never sold any goods or provide any services to M/s Shapporji Pallonji & Co. Ltd. New Delhi or their related companies. Therefore, you have failed to secure this contract from Shapporji Pallonji & Co. Ltd., New Delhi. Ultimately we were able to get some orders in this project from another bidder, namely M/s. Niveshan, New Delhi, in respect of only passive items. There is no question of any pending debt and you are also not falling under the definition of Operational Creditor and also there is no default of payment of any debt. We have already informed you

that the project was not awarded by M/s. Shapporji Pallonji & Co. Ltd., so question of commission does not arise.

Therefore, we state that there is so such claim, since you had no role to play in us getting this contract. We got this order out of our own initiative. Your debt does not fall within the definition of Operational Debt under Insolvency and Bankruptcy Code, 2016 as no service was provided by you in us getting the contract. Therefore your demand notice is vague and baseless.”

7. Under the scheme of Code, when Notice of Dispute has been issued and dispute raised is supported by any evidence and is not a moonshine defence, the Adjudicating Authority is not to entertain Section 9 Application and reject the Section 9 Application. The Notice of Dispute clearly held that no material was sold to M/s. Shapporji and Pallonji & Co. Ltd. The dispute which has been raised is a genuine dispute which required further investigation, cannot be subject to a Section 9 Proceeding. It is always open for the Appellant to seek his remedy in law for recovery of dues, if any, in accordance with law but for such disputed issues, Section 9 Proceeding cannot be invoked at the instance of Operational Creditor. We thus do not find any good ground to entertain this Appeal. The Appeal is dismissed.

**[Justice Ashok Bhushan]
Chairperson**

**[Mr. Barun Mitra]
Member (Technical)**

Basant/nn